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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 169

AMES NOWELL, *Petitioner,*

v.

MARGUERITE LOVELETT NOWELL

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

PETITIONER'S REPLY MEMORANDUM ON THE FINALITY OF THE JUDGMENT BELOW

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In conformity with Rule 24(4), this brief reply is directed solely to respondent's assertion (Br. Op. 8-12) that the judgment below now sought to be reviewed is not final within 28 U.S.C. § 1257(3).

THE JUDGMENT BELOW WAS A FINAL JUDGMENT BECAUSE IT DECIDED ALL ISSUES IN DISPUTE BETWEEN THE PARTIES AND GAVE SPECIFIC DIRECTIONS TO THE TRIAL COURT TO TAKE SPECIFIED MINISTERIAL STEPS WHICH THAT TRIBUNAL HAD NO DISCRETION TO VARY IN ANY PARTICULAR

We said (Pet. 2) that "The judgment of the Supreme Court of Connecticut was final, because following its entry, only a ministerial act remained to be done," citing Pet. App. A12-A13,[1] *Republic Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68, and *Construction Laborers* v. *Curry,* 371 U.S. 542, 549-551.

We shall first analyze the operative directions of the Supreme Court of Connecticut to show that it decided every issue in dispute between the parties; second, that it required the doing of only a ministerial act, and that, as a matter of Connecticut law, the Superior Court could only enter a judgment as directed, without any discretion to vary its terms in the slightest; third, that the open issues suggested by the respondent had either been foreclosed by the opinion of the Supreme Court or else had nothing to do with the entry of the judgment; and finally that, under the settled practice of this Court, what the Supreme Court of Connecticut had determined was in every respect a final judgment for purposes of review.

A. The Supreme Court of Connecticut Decided Every Issue That Had Been Disputed by the Parties.

The directions of the Supreme Court of Connecticut were as follows (Pet. App. A12-A13):

> "The defendant must pay any arrearages which are due under the court order granting alimony

[1] Since the petition was filed, the opinion below has been officially reported, and the cited pages will now be found at 157 Conn. 470, 484-485.

pendente lite. The defendant must comply with all the requirements of the judgment until October 9, 1967. He must pay support of $1650 monthly until October 9, 1967, and he must also pay the plaintiff's counsel fees of $24,000. Moreover, the defendant must pay the plaintiff's counsel fees of $6000 to defend this appeal since they had been ordered before the Texas judgment became final. In the event that the house in Darien has not yet been sold, we direct that its disposition should be governed by the terms of the Texas judgment.

"The judgment for a legal separation and support should be vacated as of October 9, 1967, and the total amount of support and counsel fees which is owed by the defendant should be set forth in the judgment vacating the judgment of April, 1966."

It is clear from the record, not only that those directions decided every issue that had been disputed by the parties, but also that they left no discretion whatever to the Superior Court on the remand.

B. The Supreme Court of Connecticut Directed the Superior Court To Take Specified Ministerial Action in the Judgment It Was Directed To Enter, and the Superior Court Had Neither Power Nor Discretion To Vary These Directions.

All of the steps directed by the Supreme Court of Connecticut to be taken were purely ministerial.

1. Since the opinion of that court shows that the support directed was at the rate of $1650 per month, the trial counsel fees ordered were $24,000 (Pet. App. A4), and the $6000 appeal fee had been paid (Pet. 8, Pet. App. A4), the determination of the figures to be entered in the Superior Court's judgment involves simply a matter of arithmetic. The support would be

$1650 times 21 9/30,[2] plus the counsel fees of $24,000. Thus the determination of the precise sum that petitioner was adjudged by the Supreme Court of Connecticut to owe involved the performance of only a purely ministerial act.

2. Again, since the Supreme Court of Connecticut specifically directed that the disposition of the Darien property "be governed by the Texas judgment" (Pet. App. A13), and since the provisions in the latter relating to the house in Darien are clear, execution by the Superior Court of the direction given it will likewise be ministerial.

The Texas judgment provided as follows (Pet. App. A22):

> "It is further ORDERED, ADJUDGED AND DECREED that the parties hereto shall forthwith sell the house and lot located at 35 Tokeneke Drive, West, Darien, Connecticut, and that the parties hereto shall thereupon pay the then outstanding mortgage indebtedness and thereafter the net proceeds from said sale be divided equally between Plaintiff, Ames Nowell, and the Defendant, Marguerite Lovelett Nowell."

The direction that the parties sell the property "forthwith," pay the mortgage thereon, and divide the "net proceeds from the sale" necessarily precludes any controversy over unpaid taxes. For, since the Texas judgment did not direct either party to pay those taxes,

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[2] Although the Texas decree was entered on December 22, 1965 (Pet. App. A3, A24), the husband had paid the full monthly sum for December 1965 (R. 103). The decision below held that he was bound to pay such support until October 9, 1967, the date that the wife's petition for certiorari was denied here (Pet. App. A9-A10). That left due all of 1966, the first nine months of 1967, and the first 9 days of October 1967, or 21 9/30 months in all.

it is quite clear that "net proceeds from the sale" means gross sales price after payment of the mortgage indebtedness, less the unpaid taxes.

3. Finally, under Connecticut law, the trial court is bound by the mandate of the Supreme Court, which it must execute. Where, as here, a new trial is not awarded, but "the case was returned, as is frequently done, with a mandate defining and limiting the duty of the trial court," * * * such "mandate was controlling upon the action of the Superior Court, and prevented it from opening up the case anew." *Fair Haven & W.R. Co.* v. *New Haven,* 77 Conn. 667, 673, 60 Atl. 651, 653. "In carrying out the direction of a mandate, the Superior Court is limited to the specific direction of the mandate as interpreted in the light of the opinion. *Coughlin* v. *McElroy,* 72 Conn. 444, 44 Atl. 743; *Converse* v. *Aetna National Bank,* 79 Conn. 603, 65 Atl. 1064. It may correct a clerical error in the mandate; it cannot render a new or different judgment." *Mazzotta* v. *Bornstein,* 105 Conn. 242, 243-244, 135 Atl. 38, 39; *State Bar Assn.* v. *Connecticut Bank & Trust Co.,* 146 Conn. 556, 561, 153 A.2d 453, 456.

C. The Open Issues Suggested by the Respondent Are Either Foreclosed by the Opinion of the Supreme Court of Connecticut or Else Have Nothing To Do With the Entry of Judgment by the Superior Court.

1. Respondent, likening the "further proceedings" ordered by the Supreme Court of Connecticut (Pet. App. A13) "to a determination of damages after the issue of liability has been resolved" (Br. Op. 9), speaks of "evidence of damage suffered by the respondent for failure of the petitioner to abide by the orders of the Connecticut courts" (*ibid.*).

But this overlooks entirely the specific ruling of the Supreme Court of Connecticut that the petitioner hus-

band "cannot be punished for violating these preliminary injunctions because final judgment has been rendered with no provision in that judgment for damages arising from the civil contempt," and that accordingly the issues "directed to the injunctions and the adjudications of contempt * * * have become academic" (Pet. App. A11).

Moreover, the Supreme Court denied the respondent wife's motion to reargue (Pet. App. A15), in which a claim for damages arising out of the alleged contempt was expressly set forth.[3]

Accordingly, it follows that the issue of damages now sought to be interposed in an endeavor to destroy the finality of the Supreme Court of Connecticut's determination is one that the Superior Court would be unable as a matter of Connecticut law to explore; see the authorities cited above, Point B3, p. 5.

2. Similarly, respondent's assertion (Br. Op. 9) that "arrearages under the order pendente lite must be determined" is unavailing to establish non-finality. As we have shown (Point B1, *supra*, pp. 3-4), the determination of the amount to be inserted in the judgment is a plainly ministerial matter of elementary arithmetic. Once that simple calculation has been made, the extent of petitioner's liability has been determined. The matter of suggested arrearages involves, not the

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[3] On p. 4 of the wife's motion to reargue (not printed, but included in the certified record on file with the Clerk), she argued that "2. *Damages may be ascertained at the time of the hearing on the new judgment*", saying *inter alia* that "By violating the Connecticut anti-suit injunction, the defendant has deprived the plaintiff of the Connecticut awards for alimony and support and must be answerable in damages to the plaintiff for violation of that order."

entry of judgment, but rather the satisfaction of that judgment.

If the Supreme Court of Connecticut had undertaken to do the arithmetic itself instead of turning back that detail to the trial court, it would have inserted the sum of $59,145 in its judgment (Pet. App. A14).[4] Since under that alternative it could not possibly be contended that the determination of asserted arrearages rendered the judgment non-final, the same contention, in a situation where the mechanics of computation have been relegated to the trial court, is equally unavailing to detract from the finality of the judgment entered by the Supreme Court of Connecticut.

D. The Decisions of This Court Plainly and Clearly Demonstrate That the Judgment Below Was a Final One for Purposes of Review.

The test for finality of State court judgments, under a long line of decisions here, is not whether the judgment sought to be reviewed is called final as a matter of State practice, but whether, after it has been entered, there remain questions to be decided by, or any matters are left to the discretion of, the trial court.

Here, as we have shown, nothing was left to be decided; the trial court had been specifically directed what to do and had no power or discretion to vary the mandate; and its only duty was to undertake the formality of doing the necessary arithmetic, and then to perform the merely ministerial act of recording the directions of the Supreme Court of Connecticut. Accordingly, the judgment of the latter tribunal was final within 28 U.S.C. § 1257(3).

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[4] See p. 4 above: $1650 \times 21\ 9/30 = \$35145 + \$24000 = \$59145$.

It will suffice to adduce a few representative decisions in support of the foregoing conclusions.

"So far as these respondents are concerned, there is nothing more to be decided. * * * By that opinion, which by reference was incorporated in the judgment [see Pet. App. A14 in this case], nothing was left to the discretion of the trial court * * *." *Clark* v. *Williard,* 292 U.S. 112, 118. *Accord, Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, 72-74; *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, 382; *Construction Laborers* v. *Curry,* 371 U.S. 542, 548-552.

The State court judgment is final "when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. * * *

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final, * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking* v. *Pink,* 317 U.S. 264, 268; *Cole* v. *Violette,* 319 U.S. 581, 582.

"The judgment for our purposes is final when the issues are adjudged. * * * Our test is a practical one. When the case is decided, the time to seek our review begins to run." *Market Street R. Co.* v. *Commission,* 324 U.S. 548, 551, 552.

CONCLUSION

The judgment entered by the Supreme Court of Connecticut was final; this Court accordingly has juris-

diction to review the same; and, for the reasons set forth in our petition for certiorari, such review should be granted.

Respectfully submitted.

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